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Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 172

MOLLY JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH HENRY FAIL, DECEASED, PETITIONER,

versus

MORGAN F. LIVINGSTON, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

HOLLY JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH HENRY FAIR, DECEASED, PETITIONER,

versus

MORGAN F. LIVINGSTON, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit dated and entered in this case on the 13th day of March, 1963.

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (App. 23) is reported in 315 F. (2d) 429.

JURISDICTION

The judgment of the Court of Appeals was entered on the 13th day of March, 1963. Petition for Rehearing was denied on the 2nd day of May, 1963. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Does a Court of Appeals have the power to set aside a jury verdict for a plaintiff rendered in a case based upon two or more independent statements of claim in the alternative and direct entry of judgment for a defendant where the defendant does not move for judgment *non obstante veredicto* or a new trial as to each alternative and independent statement or theory of claim but merely moves for judgment *non obstante veredicto* on a ground specifically directed to only one statement or theory of claim not of decisive importance?

2. If such power does exist, was its exercise appropriate in this case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the United States Constitution, Amendment VII; 28 U. S. C., Federal Rules of Civil Procedure, Rule 8(e)(2), Rule 41(a)(2), Rule 50(a)(b), Rule 59(a)(b) and (d); and the Code of Laws for South Carolina, 1962, Volume 2, page 224, Section 10-679. They are printed in Appendix, *infra*, pp. 21-22.

STATEMENT

Petitioner, a resident of North Carolina, as Administrator of the Estate of Joseph Henry Fail, deceased, brought suit for wrongful death against the respondent, Morgan F. Livingston and others, residents of South Caro-

lina, in Federal District Court to recover damages for respondent's own negligence and for the negligence of his employee allegedly imputable to him under the doctrine of *respondeat superior*, resulting in the death of petitioner's intestate who was riding as a passenger in an automobile which collided with respondent's stake body truck while it was stopped crosswise on the highway without lights in the path of travel of oncoming motorists after the driver lost control thereof when it was being towed by another truck of respondent. The action was brought for the benefit of the mother and father of petitioner's intestate, as beneficiaries under the Wrongful Death Statute of South Carolina.

The complaint, as permitted by Rule 8(e)(2) of the Federal Rules of Civil Procedure and the South Carolina Statute, Section 10-679 of the South Carolina Code, set forth more than one statement of a claim alternatively, either one of which if made independently would be sufficient. One statement of claim was based upon the liability of respondent under the doctrine of *respondeat superior* as principal for the acts of the driver of his truck who allegedly was his agent. The other independent statement of claim was based upon the liability of respondent for his own negligence in allowing his "defective truck to be operated upon the highways of this state when he knew or should have known that it was in an unsafe condition."

The evidence adduced at the trial of this case on the issue of respondent's own negligence showed (1) that respondent's stake body truck was stopped on the highway without lights and reflectors at the time of the collision (App. 30) resulting in the death of plaintiff's intestate, (2) that the truck had been in such defective condition for at least a week prior to the collision (App. 30, 31), (3) that respondent's employee was notified of such condition and

during such period of time respondent saw or could have seen that the truck was defectively equipped with lights and reflectors (App. 30, 31, 32); and (4) that respondent allowed the truck to be operated on the highway in the nighttime (App. 31, 33).

The evidence on the issue of liability based upon the doctrine of *respondeat superior* showed (1) that *res gestae* statements were made by the employee-driver of respondent to the effect that he was acting as the agent of the respondent (P. A.,* pp. A-1, A-8, A-10), (2) that at the time of the collision the respondent's trucks were in the possession of the employee-driver who was using one of the trucks to tow to respondent's place of business another truck of his which had become disabled on the highway in the nighttime, and (3) that the employee-driver was permitted by respondent to use the truck in the nighttime (App. 31, 33).

At the conclusion of the case respondent did not question the legal sufficiency of the evidence as to the issue of respondent's own negligence. The only evidence he questioned was that produced as to the issue of liability based upon the doctrine of *respondeat superior* by his motion for a directed verdict made on the specific ground that there was no evidence that the drivers of respondent's trucks were the agents or servants of respondent at the time of the collision. The District Judge denied the motion and after submission of the case to the jury a verdict in the sum of $15,000.00 was returned in favor of petitioner against the respondent and the drivers of the trucks.

Thereafter, respondent moved for judgment *non obstante veredicto* in accordance with his motion for directed verdict on the specific ground which questioned the legal sufficiency of the evidence only on the issue of defendant's

* "P. A." refers to plaintiff-appellee's Appendix filed in the Court below.

alleged liability based upon the doctrine of *respondeat superior* (App. 34). The ground of respondent's motion for judgment *non obstante veredicto* did not question the legal sufficiency of the evidence on the issue of respondent's own negligence nor was any motion for judgment notwithstanding the verdict or for a new trial made by respondent on this issue. The District Judge overruled the motion.

Upon appeal, the Court of Appeals reached the conclusion, from its own view of the testimony and particularly on the basis of the hearsay and self-serving declarations of respondent to which objection was interposed by petitioner in the trial Court, that the evidence was legally insufficient "to warrant the jury in holding that Barnes was an agent or employee of Livingston acting within the scope of his agency or employment at the time of the accident."

The Court of Appeals did not stop there, however, to consider that no pre-verdict and post-verdict motions were directed toward the alternative independent claim of liability against the respondent based upon his own negligence and, therefore, the legal sufficiency of the evidence on the issue pertaining to this alternative claim was not subject to review or, at the least, could not, in accordance with the decisions of this Court, form the basis for entry of judgment for respondent. Instead, it proceeded to review the evidence on this issue, determined that it was insufficient, and remanded the case with direction to enter judgment for respondent. Yet, nowhere in its somewhat detailed opinion was there any discussion of the propriety of reviewing the legal sufficiency of evidence on this decisive issue which was not questioned in the District Court or of directing entry of judgment for respondent. Petition for Rehearing was filed, pointing out the impropriety of directing entry of judgment for respondent (App. 28), but was

denied by the Court below on the 2nd day of May, 1963. (App. 37.)

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal procedure which has not been, but should be, settled by this Court.

This case presents for the first time in this Court the question of whether a motion for judgment *n. o. v.* made on a ground specifically directed to only one of two statements of claim in the alternative, and denied in the District Court, can form the basis of a judgment *n. o. v.* by an Appellate Court as to the whole case, notwithstanding the absence of pre-verdict and post-verdict motions directed to the other statement of claim of decisive importance.

This Court on a number of occasions since the adoption of the Federal Rules of Civil Procedure has considered the impact of Rule 50(b) on the power of a Court of Appeals to direct entry of judgment in favor of a party who lost in the District. In *Cone v. West Virginia Pulp and Paper Co.*, 330 U. S. 212, and *Globe Liquor Co. v. San Roman*, 332 U. S. 571, there were pre-verdict motions for a directed verdict and post-verdict motions for a new trial, but not for judgment *n. o. v.* In *Weade v. Dichmann, Wright & Pugh*, 337 U. S. 801, which involved an action based upon two statements of claim in the alternative, it appears, although the opinions of the Court of Appeals and this Court do not clearly indicate, that there was a pre-verdict motion for directed verdict and a post-judgment motion for judgment *n. o. v.* or new trial directed to both theories of plaintiff's claim; but since the Court of Appeals' direction of verdict was based upon the untenability of only one theory of claim and not the other, this Court reversed. In *Johnson v. N. Y., N. H. & H. R. Co.*, 344 U. S. 48, there was a pre-

verdict motion for directed verdict and a post-verdict motion which the Court of Appeals construed as a motion for judgment *n. o. v.* On certiorari to this Court it was held that the motion was not in accordance with the precise plan of Rule 50(b) and, therefore, had no legal efficacy to form the basis for a judgment *n. o. v. Fountain v. Filson*, 336 U. S. 681, involved the entry of a summary judgment in favor of a party by the Court of Appeals on an issue as to which the opposite party had no opportunity to present a defense before the trial Court. Based upon the rationale of *Cone v. West Virginia Pulp & Paper Co.* and *Globe Liquor Co. v. San Roman*, this Court reversed the entry of judgment.

The present case in which there were no pre-verdict and post-verdict motions directed to an issue of decisive importance presents an equally important facet of the same general problem.

Rule 8(e)(2) authorizes a plaintiff to set forth in his complaint two or more independent statements of claim in the alternative. In accordance therewith, petitioner's case was based upon two independent statements of claim in the alternative. As to one independent claim there were no pre-verdict and post-verdict motions. The only motion made by respondent for judgment *n. o. v.* was on a ground based on the particular legal theory that the evidence on only one independent theory of claim was legally insufficient.

Consequently, when the Court of Appeals directed entry of judgment *n. o. v.* for respondent, notwithstanding the requirement of Rule 50 that a pre-verdict and post-verdict motion "shall state the specific grounds therefor", it held by necessary implication that the petitioner by framing his complaint in accordance with Rule 8(e)(2) took the risk of being deprived of the opportunity of making a showing for the exercise of the District Judge's discretion vested in

him under Rules 41(a)(2) and 50(b) as to an issue of decisive importance not questioned in the Court below. Just as this Court in *Johnson v. N. Y., N. H. & H. R. Co.*, 344 U. S. 48, reasoned and concluded that the purported motion for judgment *n. o. v.* therein was inadequate to afford a basis for judgment *n. o. v.*, so likewise in the case at bar, in accordance with principles of fairness and justice to give litigants an opportunity to make a showing and District Judges the opportunity to exercise the discretion vested in them as to issues of decisive importance in the trial Court, a Court of Appeals should not be permitted to direct entry of judgment *n. o. v.* on a ground not presented before the trial Court.

It, thus, appears that the Court below has in this case decided an important question of federal procedural law which has not, but should be, settled by this Court.

The importance of the Rules to secure a just, speedy and inexpensive determination of every action makes it important and desirable that this Court inform bench and bar whether the practice of setting forth in a complaint independent statements of a claim in the alternative, in accordance with Rule 8(e)(2), has the effect of nullifying the requirement of Rule 50 that motions made thereunder "shall state the specific grounds therefor", and operates to deny litigants the opportunity of making a showing and District Judges the opportunity of exercising the powers and duties vested in them under Rules 41(a)(2) and 50(b) as to issues of decisive importance.

2. The decision of the Court of Appeals in directing entry of judgment for respondent is in conflict with Rule 50(a) and (b) of the Federal Rules of Civil Procedure and the decisions of this Court in which the rule has been construed.

The issues in this case are (1) whether a Court of Appeals, by directing entry of judgment *n. o. v.* against a party who won in the trial Court, has the power to deny him the opportunity of making a showing and the District Judge the opportunity of exercising the discretionary powers vested in him under Rules 41(a)(2) and 50(b) as to an issue of decisive importance which they had no occasion to exercise because the legal sufficiency of such issue was not questioned in the Court below; (2) whether a Court of Appeals has the power to review the legal sufficiency of evidence on an issue of decisive importance in the absence of a motion for a directed verdict, judgment *n. o. v.*, or for a new trial; and (3) whether a Court of Appeals has the power to weigh conflicting inferences and judge the credibility of witnesses.

On the first issue the decision of the Court below is in direct conflict with an unbroken line of decisions of this Court holding that Rule 50(b) of the Federal Rules of Civil Procedure forbids the Trial Judge or an Appellate Court to direct entry of judgment in favor of an appellant who lost in the Court below in the absence of a motion for judgment *n. o. v.* made in the District Court within ten days after the reception of the verdict.

Globe Liquor Co. v. San Roman, 332 U. S. 571;
Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212;
Fountain v. Filson, 336 U. S. 681;
Weade v. Dichmann, Wright & Pugh, 337 U. S. 801;
Johnson v. N. Y., N. H. & H. R. Co., 344 U. S. 48.

In each case the question before this Court was whether the Appellate Court could order judgment for a successful appellant on an issue of decisive importance as to which the opposite party had no occasion in the trial Court to exercise his rights under Rule 41(a)(2) of the Federal Rules of Civil Procedure and as to which the trial Judge had no occasion to exercise the discretion vested in him under Rule 50(b) of the Federal Rules of Civil Procedure.

The underlying rationale of the decisions, grounded upon principles of fairness and justice, is that Rule 50(b) should not be construed to deprive litigants the opportunity of making a showing and District Judges the opportunity of exercising the discretionary powers vested in them under Rules 41(a)(2) and 50(b) as to an issue of decisive importance, the legal sufficiency of which was not questioned in the trial Court.

The rationale of the foregoing cases applies with equal, if not greater, force to the instant case which presents the same important problem. Here respondent did not in the trial Court raise the issue of the legal sufficiency of the evidence as to petitioner's case based upon the theory of respondent's own negligence. Consequently, there was no occasion for respondent to make a showing or for the District Judge to exercise the discretionary powers vested in him by Rules 41(a)(2) and 50(b) as to this theory of claim. Therefore, the action of the District Judge in denying the motion for judgment *n. o. v.* made on a ground which questioned only one of the two statements of petitioner's claim was in consonance with the requirements of Rule 50. Compare *U. S. v. Mobile & O. R. Co.* (5th Circuit), 8 F. (2d) 613.

When the Court of Appeals reviewed the legal sufficiency of the evidence not only as to the theory of claim questioned in the Court below but also as to the theory of claim of respondent's own negligence, the case on appeal

thus turned upon a different issue—one not raised or questioned in respondent's motion for judgment *n. o. v.* before the trial Court.

Therefore, when the Court of Appeals reviewed the evidence as to both independent statements of claim and directed entry of judgment for respondent, it held by necessary implication that petitioner, by invoking Rule 8(e) (2) in setting forth in his complaint two statements of claim alternately did so at the risk of having the legal sufficiency of the evidence as to each separate and independent claim of petitioner preserved for review on appeal by the opposite party and of having the entire case subjected to judgment *n. o. v.*, notwithstanding that the opposite party merely questioned the evidence as to only one independent statement of claim and did not direct any motion to the other statement of claim which became of decisive importance.

The true effect of the holding of the Court below would be to strike down the safeguards established by the Rules grounded upon principles of fairness and justice; it would deprive a litigant of the opportunity of presenting reasons to invoke Rule 41(a)(2) and abolish the prerogative of the District Judge to exercise the discretionary powers vested in him under Rule 50(b); it would permit a Court of Appeals to grant judgment *n. o. v.* on grounds not presented or which do not afford a basis for judgment *n. o. v.* in the Court below, notwithstanding the requirement of Rule 50(a) that a "motion for a directed verdict shall state the specific grounds therefor"; and, finally, it would have the effect of restoring the procedural complexities, ambiguities, confusion and uncertainties treated by this Court in *Johnson v. N. Y., N. H. & H. R. Co.*, 344 U. S. 48, which Rule 50 "was adopted to end".

It is respectfully submitted that a Court of Appeals not only lacks the power to direct entry of judgment *n. o. v.* in the absence of a motion for judgment *n. o. v.*, but in the light of Rule 59 of the Federal Rules of Civil Procedure also lacks the power to even go so far as to remand for a new trial. In the case at bar there was not only an absence of a motion for judgment *n. o. v.*, but also an absence of a motion by respondent for a new trial and, of course, more than 10 days had elapsed since the entry of judgment on the verdict in the District Court. Under such circumstances, as stated in *Jackson v. Wilson Trucking Corp.*, 243 F. (2d) 212, in which the Court of Appeals for the District of Columbia reversed the action of the District Court granting a new trial upon denying a motion for judgment *n. o. v.* after the expiration of 10 days from the date of entry of judgment,

> "The precise question has not been decided by the Supreme Court, but the Supreme Court has considered Rule 50(b) in several cases, * * *.
>
> "These cases do not solve our problem, but none of them militates against the solution we reach, and at least they demonstrate that unless a motion for the greater remedy, for judgment *n. o. v.*, is timely filed it may not be granted even though a motion for a new trial has been timely filed. While it does not necessarily follow from the Supreme Court decisions that the lesser remedy may not be granted in the converse situation, we think this does follow from the necessity of giving efficacy to Rule 59(b) and Rule 59(d). They would be largely nullified were it to be held that an ill-founded, though timely, motion for judgment *n. o. v.* under Rule 50(b) must be deemed either to include a motion for a new trial though none be actually filed, or to hold open for more than 10 days the authority of the Court under Rule 59(d) to grant a new trial on its own initiative. * * *"

The allowance of the petition in this case would afford this Court the opportunity to review and resolve the problems involved herein on an important question of federal procedural law and appellate review and would be conducive to the fair and efficient administration of justice.

3. The action of the Court below constituted an invasion of the province of the jury, contrary to the Seventh Amendment to the United States Constitution.

The Court below undertook to review not only the evidence on the issue of agency as to which respondent's motion for judgment *n. o. v.* was specifically directed, but also undertook the power to review the evidence for legal sufficiency on the issue of respondent's own negligence as to which no motions for directed verdict, judgment *n. o. v.* or new trial were directed, and remanded the case with directions to enter judgment *n. o. v.* for respondent on the assumption that the evidence was legally insufficient to support either independent claim of petitioner. The petitioner challenges both the power and the assumption of the Court below. He submits that not only did the Court below violate the rule that a Court of Appeals has no power to review the evidence and direct entry of judgment *n. o. v.* in the absence of a motion for judgment *n. o. v.* specifically stating the grounds therefor as to each issue of decisive importance, but also that the verdict of the jury is amply supported by the evidence of record.

The basis of petitioner's claim is that the respondent is liable in damages for the wrongful death of petitioner's intestate because of either (1) respondent's own negligence or (2) the negligence of his alleged agents imputable to respondent under the doctrine of *respondeat superior*. As to the issue of agency, the finding that Barnes was acting as the agent or employee of respondent within the scope of

his agency or employment at the time of the collision is clearly supported by the record evidence of the purpose for which respondent's trucks were used, the *res gestae* statements made by respondent's employee Barnes both when he took the truck and immediately after the collision, and the general authority given by respondent to use the truck in the business of respondent.

The Court below, in concluding that the evidence was insufficient to warrant the jury in holding that Barnes was an agent or an employee of Livingston acting within the scope of his agency or employment at the time of the collision, contrary to established principles of law and invading the province of the jury, judged the credibility of the witnesses and viewed the case in the light most favorable to respondent; it disregarded material evidence of record and relied solely upon the testimony of respondent and his employee Barnes, and upon hearsay and self-serving declarations of respondent Livingston which, over objection of petitioner, were adduced from the testimony of respondent's witness Lowther who, on a previous occasion, had engaged the truck to be used in the business of respondent for a purpose similar to that for which the respondent's truck was used on the occasion in question, and whose testimony that he, in effect, was *particeps criminis* in inducing Barnes to use his employer's truck without permission raised a serious issue as to the credibility of the witness Lowther.

Viewing the case as to the issue of agency, however, in the light most favorable to petitioner, as it must be viewed on appeal, it becomes clear that a finding that Barnes was the agent of respondent at the time of the collision is amply supported by the evidence of record. The facts as adduced at the trial and contained in the record show (1) that respondent's employee Barnes was in the possession of re-

spondent's trucks for the purpose of protecting respondent's interest; that is, for the purpose of towing respondent's stake body truck which had become disabled on the highway in the nighttime; (2) that when Barnes obtained possession of one of respondent's trucks for the purpose of towing back the stake body truck of respondent, he stated to the person whom he requested to accompany him that he was performing this work at the specific instructions of his employer, respondent Livingston, and immediately after the collision he also made the statement to the highway patrolman that he was towing the truck for his employer, the respondent Livingston, all of which clearly presented a jury question under the firmly established principle in South Carolina, as laid down by the Supreme Court of South Carolina in *Chantry v. Pettit Motor Co.*, 156 S. C. 1, 152 S. E. 753, and the cases cited therein, to the effect that "one who is in possession of property of the owner and uses it in the service of the owner is presumptively a servant of the owner." Moreover, both respondent Livingston and Barnes were parties to the action and their testimony, together with the testimony of Lowther, contained self-contradictions and equivocations, was evasive and clouded with uncertainties and generalities, and their demeanor on the stand and manner of testifying gave rise to doubts of their sincerity. Compare *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620; *Quock Ting v. U. S.*, 140 U. S. 417.

Moreover, on the issue of respondent's own negligence, as to which the sufficiency of evidence was not questioned in the trial Court, the evidence of record clearly showed (1) that respondent's stake body truck was without lights and reflectors at the time of the collision which resulted in the death of plaintiff's intestate; (2) that the truck had been in such defective condition for at least a week prior to the collision, at which time respondent's employee was notified

of such defective condition by a highway patrolman; (3) that for some time prior to the collision the respondent Livingston saw or could have seen that the truck was defectively equipped with lights and reflectors; and (4) that respondent allowed the truck to be operated by his employee Barnes on the highway in the nighttime.

Clearly, it would be an undue invasion of the historic function of a jury for an Appellate Court to judge the credibility of witnesses and weigh conflicting inferences and conclusions that may be drawn from the evidence. This is an established rule of judicial review.

Wilkinson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620;
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29.

Therefore, it is respectfully submitted that the Court below by judging the credibility of the witnesses and substituting its view of the case for that of the jury invaded the province of the jury, contrary to the rights of the petitioner under the Seventh Amendment to the Constitution of the United States.

The issue raised under this heading involves an important question of federal appellate review on which the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari, should reverse the judgment of the Court below, and should affirm and reinstate the judgment of the District Court as to respondent Livingston.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 U. S. C., **Federal Rules of Civil Procedure**

"Rule 8. **General Rules of Pleading**

* * *

"(e) **Pleading to be Concise and Direct; Consistency.**

* * *

"(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. * * *"

"Rule 41. **Dismissal of Actions**

"(a) **Voluntary Dismissal: Effect Thereof.**

* * *

"(2) **By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * *"

"Rule 50. **Motion for a Directed Verdict**

"(a) * * * A motion for a directed verdict shall state the specific grounds therefor.

"(b) **Reservation of Decision on Motion.**

* * * Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon

set aside and to have judgment entered in accordance with his motion for a directed verdict; * * *. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. * * *"

"Rule 59. **New Trials; Amendment of Judgments**

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in any action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in any action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. * * *

"(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * *

"(d) **On Initiative of Court.** Not later than 10 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

Code of Laws for South Carolina, 1962, Volume 2, page 224

"Section 10-679. **Pleading when two or more acts of negligence, etc., alleged.**

"When two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to the injury for which the suit is brought the party plaintiff in such suit shall not be required to state such several acts separately nor shall such party be required to elect upon which he will go to trial but he shall be entitled to submit his whole case to the jury under the instruction of the Court and to

recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs alleged in the complaint."

DECISION OF COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Argued January 21, 1963. Decided March 13, 1963.)

Before HAYNSWORTH and BRYAN, Circuit Judges, and MICHIE, District Judge.

William A. Horger (Horger & Horger, Charlton B. Horger, and Marshall B. Williams on brief) for Appellant, and Henry Hammer and Henry H. Edens (Edens and Hammer, Julian S. Wolfe, Lofton M. Fanning, and W. T. Klapman on brief) for Appellee.

MICHIE, District Judge:

Appellee's intestate was killed when an automobile in which he was a passenger crashed into a stake-body truck, which had broken down and was being hauled by a pickup truck, and, both vehicles getting out of control, had skidded on the highway and come to a stop blocking the highway to traffic in either direction. The two vehicles belonged to the defendant Morgan F. Livingston and were being driven by the defendants Raymond Barnes and Bradley E. Pou. A truck owned by Reichhold Chemicals, Incorporated and driven by its employee James C. DeLoach, traveling in the opposite direction, had come upon the scene just before the fatal accident occurred but had seen the roadblock in time to stop. Reichhold and DeLoach were also made defendants but the jury found in their favor. It returned a verdict of $15,000.00 against Livingston, Barnes and Pou and judgment was entered thereon.

Only Livingston has appealed and the only issue raised is whether there was sufficient evidence to warrant the jury in holding that Barnes was an agent or employee of Livingston acting within the scope of his agency or employment at the time of the accident.

Barnes was a sharecropper on Livingston's rather large farm and also had frequently worked for Livingston over a period of approximately ten years. Livingston owned the stake-body truck as well as the pickup truck involved in the accident and Barnes used the stake-body truck in working on Livingston's farm. He was somewhat lame and was frequently allowed at the end of the day to drive the stake-body truck to his home, about three-quarters of a mile away, and to drive it back to Mr. Livington's house the next morning. He was also occasionally, when he so requested, allowed to drive the truck "to the nearby small town of Livingston, S. C. to get groceries". The pickup truck was used by Mr. Livingston for practically all of his personal driving, leaving an automobile which he also owned for the use of his wife and daughters.

A Mr. Lowther had once employed Mr. Livingston to deliver some poles for him to a fairly distant point and Mr. Livingston had himself carried the poles in the stake-body truck and delivered them. On the morning of the accident Mr. Lowther happened to see Barnes in the stake-body truck and asked him if he would deliver some poles to Ridgeland, South Carolina. Barnes agreed to do so and Lowther paid him $15.00 in advance for doing so. It was understood that Barnes was expected and intended to keep the $15.00.

Barnes picked up the poles and, without advising Livingston of his plans or asking his permission, delivered the poles to Ridgeland and started back toward his home. However the truck broke down on the way back. Barnes then telephoned to Lowther (not Livingston) to report the situation. Lowther drove down to where the truck had broken down and found it parked on a side road. He pulled it further down the side road and off it on the side where he thought it would be safe and left it there, then took Barnes back towards his home telling him that he would bring him back later to get the truck.

Barnes, however, was worried and insisted that he be taken to Mr. Livingston's as he thought the truck should be gotten back that night. So they drove to Mr. Livingston's and arrived there about midnight. Mr. Livingston was in his pajamas about to go to bed, but he came out on his front

porch while Lowther's car was parked at the foot of the steps to the porch.

Barnes told Mr. Livingston what had happened and asked to be allowed to take the pickup truck down to where the stake-body truck had been left and tow the latter back. Mr. Livingston was, of course, angry as he didn't know that Barnes had taken the truck off on such a trip. Mr. Lowther assured him that the truck was in a safe place and Mr. Livingston then very positively refused to let Barnes take the pickup truck and told him several times not to touch the truck that night—all of which, of course, was heard by Mr. Lowther.

Mr. Lowther then drove home leaving Barnes at Mr. Livingston's though he was three-quarters of a mile from his home and somewhat of a cripple. Plaintiff makes much of this incident in an attempt to discredit the unanimous testimony of Lowther, Livingston and Barnes as to what in fact took place in the conversation between them which we have just recounted. So it may be as well here to give, from the record, Mr. Lowther's explanation of why he left Barnes at Mr. Livingston's. It follows:

"Q. Why did you leave him there? He didn't want to go home? Or what was the purpose of—

"Mr. EDENS: We don't need any more leading.

"THE COURT: He is your witness.

"Mr. EDENS: He is doing enough as it is.

"A. Well I offered—I told Raymond I would take him on home. I don't know if it was raining right then much, but it had been raining severely coming home, don't you know. And I told Barnes that I would take him on home, and he said 'No, no. I have put you to enough trouble, that is all right.' So I left him there in Mr. Morgan's yard. Mr. Morgan had gone back in the house and shut the door.

"Q. Do you understand why Barnes stayed there in the front yard instead of letting you drive him home?

"A. Well I didn't think it was very peculiar, because there is another one of his hands that lives in talking distance of Mr. Morgan's house, and I didn't think anything peculiar about it.

"Q. Well you figured that Barnes was going to spend the night in this other house instead of his own home?

"A. I didn't figure that. He just said he wouldn't bother me, and there was a lot of colored houses around there. So I didn't figure anything about it or what he might do. I felt like I had done my job and I didn't feel like—after I had offered to take him home and he refused, why,—

"Q. Well, I say, when you offered,—you say you offered.

"A. I did. I told him I would take him home, which I would have."

After Mr. Lowther left Barnes at Mr. Livingston's Barnes hung around there for about thirty minutes, one may infer to be sure that Mr. Livingston had gone to sleep, and then got in the pickup truck in direct violation of Mr. Livingston's orders and drove to the house of Barnes' son-in-law, Bradley Pou. He told Pou that Mr. Livingston had told him to get Pou, take him down to the location of the stake-body truck and have him steer the stake-body truck while Barnes in the pickup hauled it back to Mr. Livingston's. Barnes testified at the trial, of course, that Livingston had told him no such thing but that he had told Pou that Livingston had in order to induce Pou to go with him. And Pou did.

With Pou steering the stake-body truck and Barnes driving the pickup they hauled the stake-body truck out of the side road and onto the main road and headed towards Livingston. Just prior to reaching the scene of the accident there is a downgrade and on this grade the stake-body truck "ran up" on the pickup and "fastened to" it and pushed it across the road so that, between the two cars, the main part of the roadway was blocked and in order to pass them, a car would have had to go off the hard surface road onto its shoulders. Barnes and Pou tried to unhook the two trucks but could not do so. DeLoach in the Reichhold truck, came up almost immediately, stopped and tried to help them. But in another moment they heard a car coming, apparently very rapidly, from the opposite direction from which De-

Loach had come. So they started in its direction waving flashlights to warn it, DeLoach running and Barnes moving as rapidly as he could. The oncoming car paid no attention to the lights, never checked its speed and crashed into the stake-body truck. Plaintiff's intestate, who was a passenger and asleep, was killed and the other occupants were seriously injured.

The foregoing statement of facts speaks for itself. Obviously, if correct, Barnes was not at the time of the accident engaged in carrying out his employer's business but had engaged in a project of his own in direct violation of his employer's orders. It is true that he may have thought that what he was trying to do would be helpful to his employer's interest. But he was doing it in direct violation of his employer's orders. And it is, of course, well settled that the doctrine of respondeat superior does not apply under such circumstances. *Holder v. Haynes* (1940), 193 S. C. 176, 7 S. E. (2d) 833; 51 A. L. R. (2d) 128.

In an effort to avoid this result counsel for the plaintiff takes the position that we must disregard the positive testimony of Barnes, Livingston and Lowther with respect to the orders given by Livingston to Barnes at the midnight conference at Livingston's house. We are to assume, it is argued, that all three of them committed perjury—Barnes because he was an employee of Livingston, Livingston because he is the principal defendant in the suit—and Lowther why? Why, they say, because he is a friend of Livingston. The record hardly bears this out—at least as to any indication that he is such a close friend of Livingston as to be willing to commit perjury to defend him in a lawsuit. The only evidence on the subject is Lowther's testimony as follows:

> "Q. You and Mr. Livingston are friends?
>
> "A. Well we are not personal friends. I have only been in Mr. Livingston's house once in my life, and that was to buy a cow. I mean, I am not a personal friend of his. I just know him when I see him and speak to him and so forth, but I mean, I am not acquainted personally with him."

Under these circumstances it is unlikely that Lowther would deliberately commit perjury on Livingston's behalf and as all three participants in the conversation are in precise agreement as to what occurred and there is no evidence to indicate anything to the contrary the jury should have accepted that testimony and we do.

The plaintiff makes one more point which deserves brief mention. Some time within the week before the accident a state highway patrolman had stopped Barnes in the stake-body truck in the little town of Neeses—about two miles from Livingston—because the truck did not have any lights on it. And he had told Barnes to tell Mr. Livingston not to let him have the truck any more at night until it was properly equipped with lights. Barnes never reported this to Mr. Livingston and there is nothing in the evidence to suggest that Mr. Livingston ever permitted Barnes to use the truck at night. If Barnes never reported the deficiency to Mr. Livingston he can hardly be charged with negligence in failing to have the lights fixed—especially since he had never authorized Barnes to drive the truck at night, though it may at times have been dusk by the time Barnes left work to drive home, three-quarters of a mile away. It follows that this situation cannot be made a basis for support of the verdict and judgment and that they must be set aside and final judgment entered for the defendant Livingston.

PETITION FOR REHEARING

The petitioner prays that this Court grant a rehearing of its decision of March 13, 1963, reversing the judgment of the District Court and remanding the cause, with direction to set aside the verdict and enter final judgment for defendant, Morgan F. Livingston, upon the following grounds:

First

The decision of this Court in setting aside the verdict and directing entry of judgment for defendant Livingston was obviously based upon its conclusion that, "Only Livingston has appealed and the only issue raised is whether there was sufficient evidence to warrant the jury in holding that Barnes was an agent or employee of Livingston acting

within the scope of his agency or employment at the time of the accident." In directing entry of judgment for the defendant this Court, therefore, must have overlooked that under the decisions of the United States Supreme Court in *Globe Liquor Co. v. San Roman*, 1948, 332 U. S. 571, 68 S. Ct. 246; *Cone v. W. Va. Pulp & P. Co.*, 330 U. S. 212, 67 S. Ct. 752, 91 L. Ed. 849, and *Weade v. Dichmann, Wright & Pugh*, 337 U. S. 801, 69 S. Ct. 1326, it was without power to direct entry of judgment for the defendant because plaintiff's case also was based upon the alternative independent theory of liability for defendant Livingston's own negligence and as to the issue on this theory of liability the sufficiency of the evidence was not questioned in the District Court by any motions of the defendant for directed verdict, judgment *non obstante veredicto* or for a new trial, nor by any specific ground relating thereto contained in the motions of the defendant as to the other theory of liability based upon agency and imputed negligence, as appears from the record of the case as follows:

EXCERPT FROM PLAINTIFF'S COMPLAINT

"(9) That the joint, several and concurrent negligent, grossly negligent, careless, reckless, heedless, willful and wanton acts of the defendants were proximate and concurring proximate causes of the painful and fatal injuries suffered by the deceased, Joseph Henry Fail, and the damages hereinafter set forth to the parties for whom this action is brought in the following particulars, to wit:

"(a) In the defendant, Morgan F. Livingston, allowing the 1949 Ford stake body truck to be operated upon the highways of this state when he knew or should have known that it was in an unsafe condition."

EXCERPTS FROM TRANSCRIPT OF RECORD

Testimony of Patrolman J. M. Smith

(Pages A-1, 2 and 3 of Appendix for Appellee)

DIRECT EXAMINATION

By Mr. EDENS:

(Tr. 52-54)

"Q. Did you examine that stake-bodied truck?

A. Yes, sir.

Q. Did it have any lights on the rear end of it?

A. No, sir.

Q. Did it have any place for any light?

A. It had the shell for one clearance light on the body, and one reflector shell which the wire was not even running to the one clearance light shell, and the reflector shell—the reflector was broken out of it.

Q. Could you tell whether it was broken out in the wreck or it had been that way for some time?

A. Well I had stopped the vehicle previously and they were not working at that time.

Mr. HORGER: Now, Your Honor, we object to that. It has got to be connected immediately, sir. And we ask that it be stricken.

The COURT: How much prior to the morning of the collision had you seen that same truck?

A. It was within a week.

The COURT: Within a week?

A. Yes, sir.

The COURT: I think it is competent for what it is worth. It is for the jury to say.

Q. And for what did you stop it the week previous?

A. I saw it going down a back street in Neeses, and I had an occasion to stop the truck because it didn't have any lights on it, and I talked with Raymond Barnes, who was driving it at that time. I told him to take the truck back to Mr. Livingston and tell him that if he had let him have it not to let him have it any more at night until it was properly equipped.

Q. And when you observed it on the night of this accident, had there been any changes made so far as the lighting arrangements were concerned insofar as you could detect?

A. Not in my determination.

* * *

Q. Had you ever seen that truck in the custody of anyone but Barnes?

A. To the best of my knowledge, he was the only one that I had seen driving it.

* * *"

Testimony of Raymond Barnes

(Pages A-5, 6 and 7 of Appendix of Appellee)

CROSS EXAMINATION

By Mr. WILLIAMS:

(Tr. 143)

"* * *

Q. Now were you using this truck at night at any time?

A. Was I using it at night?

Q. Yes.

A. Sometimes, yes, sir.

Q. At this particular time when the accident occurred?

A. Yes, sir.

* * *"

By Mr. EDENS:

(Tr. 147-148)

"* * *

Q. Just how are you working for him now?

A. I'm farming a little bit.

* * *

(Tr. 150-152)

Q. After the patrolman stopped you a few days before this wreck, what did you do with that truck after that?

A. Went home.

Q. You went home and kept the truck at your house?

A. Every now and then, yes.

Q. Well when it wasn't at your house, where was it?

A. To Mr. Morgan's house.

* * *

Q. When you didn't have it, he had it. He could look at the truck and see what shape it was in, couldn't he? If he had looked, he could have seen.

A. He could, I reckon.

* * *"

Testimony of Bradley E. Pou

(Page A-11 of Appendix of Appellee)

CROSS EXAMINATION

By Mr. EDENS:

(Tr. 171)

"Q. I am talking about the stake body truck. He (referring to Raymond Barnes) had that in his possession all the time, didn't he? (Parentheses supplied.)

A. Yes, sir.

Q. He and the truck were together all of the time?

A. Yes, sir.

Q. On Mr. Livingston's place. And whatever he had to do or wherever he wanted to go, he used that truck?

A. Yes, sir.

Q. Isn't that right?

A. Yes, sir.

Q. And they wanted to get the truck off the highway that night, that stake body truck. It was Mr. Livingston's truck, wasn't it?

A. Yes, sir, it was his truck.

Q. And they didn't want to leave that stake body truck out on the highway where somebody would run into it, did they? Isn't that right?

A. Yes, sir.

Q. That is the reason they wanted to go get it in the middle of the night, and they got you up in the middle of the night to go get it, didn't they?

A. Yes, sir.

Q. That is all.

* * *"

Testimony of Morgan F. Livingston

(Pages 45 of Appendix of Appellant)

DIRECT EXAMINATION

By Mr. WILLIAMS:

(Tr. 190-191)

"Q. Yes, did you ever let him (Raymond Barnes) drive the stake-body truck? (Parentheses supplied.)

A. Well, sometimes I let him drive it home at night and to come back in it the next morning.

* * *"

(Page A-18 of Appendix of Appellee)

CROSS EXAMINATION

By MR. EBENS:

* * *

"Q. Well he (Raymond Barnes) had authority to drive it to his house and have it and have the key in his pants, didn't he, that night? (Parentheses supplied.)

A. That night, yes, sir.

* * *"

DEFENDANT LIVINGSTON'S MOTION FOR DIRECTED VERDICT

(Reporter's Transcript, page 95)

"Mr. HORGER: Your Honor, my motion is a little different. We move for a directed verdict on behalf of Morgan Livingston, on the ground that there is no connection, that the operation of the vehicle by Raymond Barnes and Pou was within the scope of their authority or that they were acting as agents of Morgan Livingston. Of course, I am not going to argue the issue, but I do want to point out one thing.

* * *

(Reporter's Transcript, pages 256, 257)

Mr. HORGER: Your Honor, of course, we move for a directed verdict, and we first move on the ground that it was due to the sole negligence of the operator of the Oldsmobile automobile, and that was the sole cause of the injuries of which the plaintiff complains of—damages.

We further move for a directed verdict as to the defendant Morgan Livingston on the ground that there is no testimony which will show that Morgan—that Bradley Pou and Raymond Barnes were acting as agents or within the scope and course of their employment.

* * *

DEFENDANT'S WRITTEN NOTICE FOR JUDGMENT NON OBSTANTE VEREDICTO

"NOTICE IS HEREBY GIVEN That the defendant, Morgan F. Livingston, intends to and does hereby move under Rule 50(b) to have judgment entered in accordance with his motion for a directed verdict. The said motion is made upon the grounds urged in his motion for a directed verdict, namely:

"(1) That there is no evidence that the defendants, Raymond Barnes and Bradley E. Pou, were operating the vehicles owned by the defendant, Morgan F. Livingston, at the time of the incident out of which this action arises as the agent or servant of Morgan F. Livingston, or within the scope of their authority, but on the contrary, the only reasonable inference to be drawn from the testimony was that the defendants, Raymond Barnes and Bradley E. Pou, were operating the vehicles involved not as the agent and servant of Morgan F. Livingston and without his authority.

MARSHALL B. WILLIAMS,
CHARLTON B. HORGER,
Attorneys for Defendant,
Morgan F. Livingston."

Orangeburg, S. C.,
April 18, 1962.

Second

This Court, in reversing, notwithstanding the absence of a motion for judgment *non obstante veredicto* as to each alternative independent theory of liability, reached a conclusion that there was not sufficient evidence to warrant the jury in holding that Barnes was an agent or employee of Livingston, acting within the scope of his agency or employment at the time of the collision. Obviously this con-

clusion was based solely upon the testimony of the defendant Livingston, his employee Barnes, and one Lowther, without considering the other evidence and inferences to be drawn therefrom. The Court must have overlooked the *res gestae* statements of Livingston's employee made both at the time he took the truck and at the time of the collision, and that the vehicles owned by the defendant Livingston at the time of the collision were in the possession of Barnes who was using them in the service of defendant Livingston for the purpose of towing Livingston's stake body truck to his farm in Orangeburg County, all of which, thus, raised a jury question under the firmly established principle in South Carolina as enunciated by the Supreme Court in *Chantry v. Pettit Motor Co.*, 156 S. C. 1, 152 S. E. 753, and the cases cited therein, to the effect that, "One who is in possession of property of the owner and uses it in the service of the owner is presumptively a servant of the owner." Additionally, the Court must have overlooked that the testimony of Livingston, Barnes and Lowther was self-contradictory, evasive, equivocal; clouded with uncertainties and generalities, and their demeanor and manner of testifying gave rise to doubts of their sincerity, all of which, under the decisions of the United States Supreme Court in *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, and *Quock Ting v. U. S.*, 140 U. S. 417, raised an issue of credibility which was for the jury to determine, thus making it manifest that the action of this Court in weighing the evidence and judging the credibility of the witnesses constituted an invasion of the province of the jury in violation of the express provisions of the Seventh Amendment to the United States Constitution.

Third

The Court, in reaching its decision directing entry of judgment for defendant, undertook to review the evidence, not only on the issue of agency and imputed negligence under one theory of plaintiff's case, but also undertook to review the issue of defendant Livingston's own negligence on the other alternative independent theory of plaintiff's case. In so doing, this Court must have overlooked that the sufficiency of the evidence on this issue was not questioned

by the defendant Livingston in the District Court by any motions for directed verdict, judgment *non obstante veredicto* or new trial, and that the ground of defendant Livingston's motion for judgment *non obstante veredicto* related solely to the issue of agency and imputed negligence based upon the doctrine of *respondeat superior* as distinguished from the issue of defendant Livingston's own negligence under the other theory of liability. Thus, this Court was without power under the decisions of the United States Supreme Court in *Globe Liquor Co. v. San Roman, supra; Cone v. W. Va. Pulp and P. Co., supra,* and *Weade v. Dichmann, Wright & Pugh, supra,* to review the sufficiency of the evidence for any purpose, particularly for the purpose of directing entry of judgment for defendant Livingston.

Fourth

This Court, in undertaking to review the evidence on the issue of defendant Livingston's own negligence, notwithstanding the absence of any question raised as to the sufficiency of this evidence by defendant Livingston in the District Court, reached the conclusion that the evidence on this issue "cannot be made a basis for support of the verdict." In reaching this conclusion, this Court must have overlooked the testimony which showed (1) that defendant Livingston's stake body truck was without lights and reflectors at the time of the collision resulting in the death of plaintiff's intestate, (2) that the truck had been in such defective condition for at least a week prior to the collision, at which time defendant Livingston's employee was notified of such defective condition by the highway patrolman, (3) that for some time prior to the collision the defendant Livingston saw or could have seen that the truck was defectively equipped with lights and reflectors, and (4) that the defendant Livingston allowed the truck to be operated, by Barnes on the highway in the nighttime, as appears by the evidence heretofore set forth in the First ground of the petition. Thus, this Court, in reaching its conclusion by weighing the evidence and judging the credibility of the witnesses, invaded the province of the jury in vio-

lation of the Seventh Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons set forth above and in the brief filed by appellee, it is respectfully urged that a rehearing be granted and that upon such rehearing the judgment of the District Court be affirmed as to defendant Livingston, or, at least in the alternative, the cause be remanded with directions to the District Court to grant a new trial as to Defendant Livingston.

Respectfully submitted,

HENRY H. EDENS,
HENRY HAMMER,
JULIAN S. WOLFE,
LOFTON M. FANNING,
W. T. KLAPMAN,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing Petition For Rehearing is presented and filed in good faith and not for delay.

HENRY H. EDENS,
HENRY HAMMER,
JULIAN S. WOLFE,
LOFTON M. FANNING,
W. T. KLAPMAN,
Attorneys for Petitioner.

ORDER DENYING PETITION FOR REHEARING

The plaintiff below, Holly Johnson, as administrator of the estate of Joseph Henry Fail, deceased, having filed a petition with this court for a rehearing of its decision of March 13, 1963, reversing the judgment of the District Court and remanding the cause with direction to set aside the verdict and enter final judgment for defendant, Morgan F. Livingston and the court having considered said pe-

tition and being of the opinion that it is without merit the petition is hereby DENIED.

ENTER this order May 2nd, 1963.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

THOMAS J. MICHIE,
United States District Judge.

A true copy,
TESTE:

RICHARD M. F. WILLIAMS, JR.,
Clerk, United States Court of
Appeals for the Fourth Circuit.

By: MARGARET L. DAVIS,
Deputy Clerk.

Office Supreme Court, U.S.
FILED
JUL 1 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 172

HOLLY JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH HENRY FAIL, DECEASED, PETITIONER,

versus

MORGAN F. LIVINGSTON, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HORGER & HORGER,
By CHARLTON B. HORGER,
WILLIAM A. HORGER,
MARSHALL B. WILLIAMS,
N. WELCH MORRISETTE, JR.,
Attorneys for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 1144

HOLLY JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH HENRY FAIL, DECEASED, PETITIONER,

versus

MORGAN F. LIVINGSTON, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

The first paragraph of Respondent's Reply Brief in the Court of Appeals was as follows:

> "The defendant-appellant realizes that the facts must be viewed in a light most favorable to the Plaintiff-Appellee and that he is entitled to all reasonable inferences and presumptions arising from the facts. However, the facts as reflected in plaintiff-appellee's brief and the inferences drawn therefrom are unwarranted by the record. Some of these discrepancies are pointed out at this time in appellant's reply brief in order that in the event they do exist appellee may direct the Court in oral argument to the portion of the transcript which contains the facts as relied on by appellee. * * *"

The Court of Appeals questioned counsel for Petitioner at length to point out the parts of the record relied upon to support the views and inferences drawn by him. The Court of Appeals properly concluded by its opinion that there were no facts or inferences that would support a verdict against the Respondent, Livingston. Petitioner's brief again sets forth unwarranted inferences and deductions and strongly and repeatedly urges in his brief that the Court overlook the *res gestae* statements. There is no *res gestae* in the record. What Petitioner refers to is a statement made to a highway patrolman about one and one-half hours after the accident by the Respondent's co-defendant, which statement was as follows:

> "* * * He said that he had been down the road around Ehrhardt with this '47 Ford 2 truck and it had broken down with him, and that he had been down there to tow it back to Livingston for Mr. Livingston, that it belonged to Mr. Morgan Livingston. For some little time there, Raymond stated that he did not know who was steering this stake-bodied truck. He said he had picked the man up down there at Ehrhardt to steer it back for him. But after talking to him, he finally stated that his son-in-law,—I believe his name is Pou—was steering the stake-bodied truck for him—Bradly Pou. * * *" (Tr. 26.)

Upon cross examination the highway patrolman said:

> "* * * Q. Was that the same night at the scene of the accident?
>
> A. The same night, yes, sir. He stated that Mr. Livingston didn't know that he had been to Ehrhardt in the truck. * * *" (Tr. 39.)

There are at least three reasons why this should not be considered as establishing agency: (1) The statement when carefully examined does not say any more than is conceded: that is, that the truck belonged to Mr. Livingston; (2) The statement could not carry any more weight than the subse-

quent statement, neither being a part of the *res gestae*, emphatically stating that Mr. Livingston did not know that he had been to Ehrhardt in the truck; and (3) Any statements made to the highway patrolman at the time (one and one-half hours after the accident) are not competent evidence of agency. This identical point was recently decided by the South Carolina Supreme Court in the case of *Marshall v. Thomason*, 127 S. E. (2d) 177, 241 S. C. 84. The Petitioner, in his brief, does not mention this recent case which is directly in point as to both agency and *res gestae* but cites as authority the case of *Chantry v. Pettit Motor Company*, (1950) 156 S. C. 1, 152 S. E. 753, which facts do not resemble the case before this Court, and deals with a statement made "immediately after the collision."

The Court of Appeals, obviously finding no evidence to support Petitioner's case, then went one step further and reviewed some of the evidence relied upon by Respondent and in its opinion pointed out the overwhelming evidence on behalf of the Respondent.

Petitioner states that the Court of Appeals has ignored the allegation in his complaint:

> "(a) In the defendant, Morgan F. Livingston, allowing the 1949 Ford stake body truck to be operated upon the highways of this State when he knew or should have known that it was in an unsafe condition." (Emphasized.)

The Court of Appeals could have properly found against Petitioner on this issue as a matter of law but instead chose to point out in the last paragraph of its opinion the absence of evidence supporting this theory of the case.

Assuming, for the purpose of argument only, that the truck had a defective tail-light, and assuming further that the Respondent knew or should have known of this condi-

tion, and assuming further that there was evidence that the alleged defective tail-light was the proximate cause of the accident; assuming all of these things, then note the word "allowing" in Petitioner's complaint which is quoted above. There is not one scintilla of evidence that the Respondent **allowed** his co-defendant to operate the stake body truck on the night in question. What limited authority existed did not encompass such personal use as this, and what limited authority which had been previously given was specifically withdrawn prior to the collision and there is no evidence to the contrary, nor is there any evidence submitted upon which any other conclusion could be reached.

The accident took place in South Carolina; therefore, we must look to South Carolina law, and this point has been considered by the south Carolina Supreme Court in the case of *Holder v. Haynes*, (1940), 193 S. C. 176, 7 S. E. (2d) 833, wherein the South Carolina Supreme Court quotes from the case of *Hunt v. Chisholm*, La. App. (1938) 183 So. 132:

> "While it was also contended that defendant should be held liable because the injury was caused by a defective, dangerous instrumentality owned by him and operated with his consent, express or implied, the Court declared: 'Of course a car operated at night in a populous city without lights is a very dangerous agency. But as defendant did not know of the illegal use being made of his car and did not know its lights were not burning, surely he cannot be held responsible for damages directly resulting from the car being operated under such conditions'."

This case is also cited in 122 A. L. R. at page 862 and in addition, A. L. R. cites the following case:

> "Again, in *Reddy-Waldhauer-Maffett Co. v. Spivey* (1936), 53 Ga. App. 117, 185 S. E. 147, *supra*, VII, plaintiff in attempting to establish the liability of defendant company did not rely solely on the relationship of mas-

ter and servant between it and a truck driver in its employ, but contended that defendant was also liable on the theory that it permitted a defective vehicle to be placed in the hands of another party, alleging the absence of a proper red rear light on defendant's truck. The court held, however, that **the fact that the machine was defective did not create an exception to the general rule that the owner of a car who was not present at the infliction of an injury could not be made liable, unless it were shown that the person in charge not only was the agent of the owner, but also was engaged at the time in the business of his master.** It was declared: 'The fact that the defect in the car was that it did not have a rear, red light attached, even if known to the owner would not in this case create a liability on the part of the owner, where the owner on the night in question did not know the employee would use the car'." (Emphasized.)

In 1957 the Supreme Court of South Carolina reaffirmed the principles set forth in *Holder v. Hames, supra*, by citing it as authority in the case of *Houle v. McDaniel*, 101 S. E. (2d) 255, 232 S. C. 125. The Supreme Court of South Carolina stated therein as follows:

> "It is manifest from the foregoing that at the time of the accident Brown was not acting within the scope of his duties as Mr. Howle's employee, but was using the car for his own purposes in nowise connected with such employment. His contributory negligence, if any, could not, therefore, be imputed to Mr. Howle under the doctrine of *respondeat superior*. *Holder v. Hames*, 193 S. C. 176, 7 S. E. (2d) 833, * * *"
>
> "In the operation of the Ford car at the time of the accident Brown was neither servant nor agent of Mr. Howle. Their relationship was that of bailor and bailee; and Brown's contributory negligence, if any, was therefore not imputable to Howle. 8 C. J. S. Bailments, § 40, p. 318, Section 56, p. 373; 60 C. J. S. Motor Vehicles, § 439, p. 1108; Am. Jur. Bailments, Section 310, p. 407; 5A Am. Jur., Automobiles and Highway

Traffic, Section 635, p. 627. Annotations: 6 A. L. R. 316 et seq., 22 A. L. R. 1246, 1248.

Liability of a bailor for injury to a third person by the bailed property in the possession of the bailee rests, not upon the bailee's negligence, but upon that of the bailor himself. Thus a bailor may be liable to a third person so injured where he has entrusted a dangerous article to one whom he knows, or to be ignorant of its dangerous quality, or an automobile to one whom he knows to be so reckless or incompetent that danger to third persons would be a reasonably probable consequence of his operation of it. So also may the bailor incur liability if injury to the bailee or another is proximately caused by a dangerous hidden defect in the bailed article, of which the bailee had no knowledge or reason to know, but which was known to the bailor at the time of the bailment. 6 Am. Jur., Bailments, Sections 314, 316, pp. 411, 413. But nothing in the evidence here warrants inference of liability on the part of the bailor under this rule." (Neither is there any such evidence in this case.)

Petitioner contends further that in view of Rule 50 of the Federal Rules of Civil Procedure, that the Court of Appeals was without authority to review the facts of the case as they pertain to the allegations of the complaint in regard to the "allowing the 1949 Ford stake body truck to be operated upon the highways * * * in an unsafe condition."

It should be pointed out that there is no evidence that the respondent **allowed** his truck to be operated on the night in question and as has been pointed out, all of the evidence is to the contrary and all of the evidence points inevitably to the fact that the truck was being operated **without authority** from the Respondent. When Petitioner failed to establish that the truck was being operated by authority of the Respondent and when all of the evidence pointed directly to the contrary conclusion, then obviously Peti-

tioner's contention that Respondent allowed his truck to be operated in an unsafe condition must also fail.

Assuming, for the purpose of argument only, that the logic set forth by the South Carolina Supreme Court in the case of *Holder v. Hames*, *supra*, is improper for some reason, it is readily apparent that Respondent did, in fact, comply with Rule 50 of the Federal Rules of Civil Procedure.

At the conclusion of all of the testimony the Respondent moved for a directed verdict and argued that the co-defendants were "forbidden" to drive the truck at the time in question, and the trial judge, at page 259 of the transcript, stated as follows:

"I would have to overrule the motion as far as the agency is concerned.

"The other matters would apply to all of the defendants' motions and that is as to actionable negligence. . . ."

Respondent's notice of motion was as follows:

"NOTICE OF MOTION

"NOTICE IS HEREBY GIVEN That the defendant, Morgan F. Livingston intends to and does hereby move under Rule 50 (b) to have judgment entered in accordance with his motion for a directed verdict. The said motion is made upon the grounds urged in his motion for a directed verdict, namely:

"(b) That there is no evidence that the defendants, Raymond Barnes and Bradley E. Pou, were operating the vehicles owned by the defendant, Morgan F. Livingston, at the time of the incident out of which this action arises, as the agent or servant of Morgan F. Livingston, or within the scope of their authority, but on the contrary the only reasonable inference to be drawn from the testimony was that the defendants, Raymond Barnes and Bradley E. Pou, were operating the vehicles involved not as the agent and servant of

Morgan F. Livingston **and without his authority**. (Emphasis added.)

/s/ MARSHALL B. WILLIAMS
/s/ CHARLTON B. HORGER,
Attorneys for Defendant,
Morgan F. Livingston."

Orangeburg, S. C.,
April 18, 1962.

It would appear obvious from the foregoing that not only was the trial judge and all parties on notice of Respondent's contention that the trucks were being operated without his authority, but that even very technically speaking, Rule 50 of the Federal Rules of Civil Procedure was, in fact, complied with.

Rule 50 (b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts, and to provide an exclusive procedural program for the federal courts which had heretofore been governed by state procedure. *Johnson v. New York, N. H. and H. R. Company*, (1952), 344 U. S. 125.

The cases cited by Petitioner in support of his contention that Rule 50 had not been followed have been read but it would unduly lengthen this brief by referring to each of them and pointing out their lack of bearing upon this case. However, each of the cases cited by Petitioner are very easily distinguishable.

The cases cited by Petitioner in support of his contention of agency deal with the Federal Employers Liability Act. There is no disagreement with the law contained in those cases but they are not similar to the case under consideration. There are numerous similar cases which have been decided by the South Carolina Supreme Court and followed by the United States Court of Appeals for the Fourth Circuit. In view of this it would seem unnecessary

to resort to factual situations far different from the type of case under consideration. A number of these cases have been cited in Respondent's main brief to the Court of Appeals, two of which appear extremely similar to the case under consideration. They are *Holder v. Harris, supra;* and *Hoehle v. McDaniel, supra.*

CONCLUSION

No new law has been established by the Court of Appeals nor has Rule 50 of the Federal Rules of Civil Procedure been violated. The province of the jury has not been violated. The facts in each case of this type must be reviewed by the appropriate appellant tribunal. The Court of Appeals did so in this case and found no evidence to support Petitioner's case and rendered its opinion accordingly.

Petitioner has failed to show grounds for a writ of certiorari and accordingly his petition for such a writ should be denied.

Respectfully submitted.

HORGER & HORGER,
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WILLIAM A. HORGER,
MARSHALL B. WILLIAMS,
N. WELCH MORRISETTE, JR.,
Attorneys for Respondent.

Orangeburg, South Carolina,
June 17, 1963.